STATE OF MICHIGAN

COURT OF APPEALS

RONALD BRYANT, JR,

Plaintiff-Appellant,

v

C & D HUGHES, INC,

Defendant-Appellee.

UNPUBLISHED
January 19, 2006

No. 256664
Jackson Circuit Court
LC No. 03-003816-NO

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendant. We reverse.

Plaintiff was employed by Interstate Highway Construction ("IHC"), the general contractor on a highway construction project. IHC entered into a subcontract with C & D Hughes, Inc. ("defendant"), a subcontractor, to perform the pipe and drainage work on the site. Plaintiff alleged that he was injured on June 24, 2002, when he fell into a manhole that was installed by defendant on April 29, 2002, and that his injuries were caused by defendant's negligence in failing to cover the manhole after it was installed. In response, defendant moved for summary disposition under MCR 2.116(C)(8) and (10) alleging that defendant, as a subcontractor, did not owe a duty to plaintiff. Further, defendant argued that plaintiff failed to refute defendant's evidence that defendant covered the manhole after it was installed. The trial court found that plaintiff failed to establish a genuine issue of material fact that defendant failed to put a cover on the manhole and granted defendant's motion.

In order to support his negligence claim plaintiff needed to prove: (1) a duty owed by the defendant, (2) a breach of that duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). Summary disposition on plaintiff's claim was appropriate only if the evidence, viewed in a light most favorable to plaintiff, failed to establish a claim as a matter of law. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). This Court reviews a trial court's decision whether to grant summary disposition de novo. *Id.* Similarly, whether defendant owed plaintiff a duty is a question of law that this Court reviews de novo. *Fultz, supra* at 463.

Plaintiff first contends that the trial court "erred in finding that defendant did not owe a duty to plaintiff." However, a review of the lower court record reveals that the trial court made

no such finding. Although the trial court noted that "the full control of the premises was [with] . . . the employer of Mr. Bryant,"[1] the court went on to note that "there has to be some kind of showing that [defendant] did something wrong." In other words, the trial court held that plaintiff had to present a genuine issue of material fact that defendant *breached* a duty owed to plaintiff. By reaching the element of breach of duty, the trial court necessarily determined that defendant owed plaintiff a duty to cover the manhole or otherwise prevent plaintiff from falling into the manhole.[2] Consequently, we need not address plaintiff's argument that defendant owed plaintiff a duty.

Plaintiff also argues that a genuine issue of material fact exists as to whether defendant breached the duty to cover the manhole. We agree.

The trial court correctly concluded that the doctrine of *res ipsa loquitur* did not apply in this case because there was no evidence that defendant had exclusive control of the construction site. See *Cloverleaf Car Co v Phillips Petroleum Co,* 213 Mich App 186, 193-194; 540 NW2d (1995). But the trial court erred by finding that plaintiff's allegation that defendant failed to cover the manhole was speculative and that plaintiff failed to create a genuine issue of fact with regard to whether defendant breached the duty to cover the manhole. Plaintiff set forth a breach of duty when he presented evidence that the manhole was uncovered. Defendant's project manager testified that defendant placed a road plate over the manhole after defendant installed the manhole. A site inspector testified that, based on the standard procedure he follows during an inspection, it was his belief that defendant covered the manhole after it was installed. But the site inspector also testified that he could not remember whether the manhole was covered and he did not know whether he followed his standard procedure the day he inspected the manhole. Thus, a question of fact exists regarding whether defendant covered the manhole.[3] Further, plaintiff's claim is not rendered speculative merely because plaintiff cannot rebut defendant's theory that some other entity or person *may* have removed the manhole cover. *Libralter Plastics, Inc v Chubb Group of Ins Companies,* 199 Mich App 482, 487-488; 502 NW2d 742 (1993). Therefore, the trial court erred in finding there was no genuine issue of material fact and in granting summary disposition in favor of defendant.

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[1] See, e.g., *Ormsby v Capital Welding, Inc,* 471 Mich 45, 56-57; 684 NW2d 320 (2004) (a general contractor has a general duty to make the work site safe).

[2] Indeed, the counter-statement of questions presented in defendant's brief addresses only the issue of whether plaintiff presented "sufficient evidence to establish a genuine issue of material fact in connection with his contention that defendant failed to place a cover over the manhole in question on April 29, 2002." Defendant does not on appeal dispute the element of duty.

[3] The dissent states that "Kunkel's uncontroverted affidavit states that defendant placed a road plate on top of the manhole after defendant installed the manhole on April 29, 2002. Similarly, Jones' deposition testimony indicates that because he completed an IDR on April 29, 2002, defendant must have covered the manhole on that day even though he had no independent recollection of the circumstances surrounding the completion of the IDR." We note that neither the affidavit of Kunkel or the deposition by Jones confirms that either gentleman personally observed that a manhole cover was placed on the manhole. In our opinion a factual question remains on this issue.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell